Office - Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

82-684

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOBBY GENE HAYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THEODORE S. WOROZBYT
Attorney for Petitioner
1414 Peachtree Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303-1665
(404) 658-1670

September 27, 1982

QUESTION PRESENTED FOR REVIEW

Did the single trial of two Defendants (Petitioner Hayes and Defendant Ward) before two separate juries, in the same courtroom, violate Petitioner Hayes' right to a fair trial in contemplation of the due process clause of the Fifth Amendment to the United States Constitution; and Petitioner Hayes' right to an impartial jury in contemplation of the Sixth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
Question Presented for Review.	1
Table of Authorities	ii
Reference to Opinions Below.	2
Jurisdiction	3
Constitutional Provisions Involved . .	4
Statement of the Case.	6
Procedural Posture.	6
Lower Court Jurisdiction.	8
Facts	8
Reasons Why the Writ Should Be Granted	11
Argument	12
Procedure	13
Effect of Prejudice	16
Supervisory Authority	16
Appendix:	
Hayes opinion	19
Certificate of Service	50
Notice of Entry of Appearance.	51

TABLE OF AUTHORITIES

Page

Dawson v. Cowan, 531 F.2d 1374 (6th Cir. 1976). 18

Mallory v. U.S., 354 U.S. 449, 77 S.Ct 1356, 1 L.Ed2d 1479 (1957). 17

McNabb v. U.S., 318 U.S. 332, 63 S.Ct 608, 87 L.Ed 819 (1943). 17

U.S. v. Crane, 449 F.2d 1385 (6th Cir. 1974) 16

U.S. v. Florea, 541 F.2d 568 (6th Cir. 1976) 17

U.S. v. Hayes, 676 F.2d 1359 (11th Cir. 1982) 2

U.S. v. Meacham, 626 F.2d 502 (5th Cir. 1980) 2, 6, 8

U.S. v. Sidman, 470 F.2d 1158 (9th Cir. 1972) 12

REFERENCE TO OPINIONS BELOW

Petitioner Hayes' original conviction was reversed by the United States Court of Appeals for the Fifth Circuit on September 26, 1980. United States v. Meacham, 626 F.2d 502 (5th Cir. 1980).

Petitioner Hayes' retrial resulted in a conviction which was affirmed by the United States Court of Appeals for the Eleventh Circuit on May 24, 1982. United States v. Bobby Gene Hayes, 676 F.2d 1359 (11th Cir. 1982).

Petitioner Hayes' Suggestion For Rehearing En Banc was denied on August 24, 1982 (unreported).

JURISDICTION

Petitioner Hayes seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit rendered on May 24, 1982.

Petitioner Hayes' Suggestion For Rehearing En Banc was denied on August 24, 1982.

Petitioner Hayes invokes jurisdiction of this Court under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, to wit:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment for indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

This case involves the Sixth Amendment to the United States Constitution, to wit:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Procedural Posture

On November 19, 1980, in the United States District Court for the Southern District of Alabama, Mobile Division, a two count indictment was returned and entered by the grand jury charging Petitioner Hayes and Co-Defendants Metzger, Meacham, Gilroy, and Ward with (a) conspiracy to possess (with the intent to distribute) marijuana in violation of Section 846, Title 21, U.S.C., and (b) conspiracy to import marijuana in violation of Section 963, Title 21, U.S.C. All Defendants had previously been convicted for the same transaction on March 9, 1979, but those convictions were reversed by the United States Court of Appeals for the Fifth Circuit due to an insufficient indictment. United States v. Meacham, 626 F.2d 502 (5th Cir. 1980). Pursuant to the court's directive in United States v. Meacham, 626 F.2d 503, 512 (5th Cir. 1980), Petitioner Hayes filed a motion to sever his trial from that

of Defendant Ward.

The government filed a motion for the court to impanel two juries for trial, wherein the government urged that the interest of judicial economy would be served by the granting of said motion.

On March 5, 1982, the trial court granted the government's motion to impanel two juries for trial.

On March 10, 1981, the Co-Defendants Metzger, Meacham and Gilroy pled guilty, thereby leaving the two juries which had been selected on March 9, 1981, to try the two remaining Defendants, Petitioner Hayes and Defendant Ward. On March 10, 1981, in a chambers conference immediately preceding the commencement of the trial, Petitioner Hayes' counsel objected to the double jury procedure.

The trial of Petitioner Hayes and Defendant Ward commenced on March 10, 1981, before two juries. During the course of the trial, Hayes renewed his motion for sever-

ance, which was denied.

On March 12, 1982, the jury returned with guilty verdicts on both counts against Petitioner Hayes.

On May 24, 1982, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction of Petitioner Hayes.

On August 24, 1982, Petitioner Hayes' Suggestion For Rehearing En Banc was denied.

Lower Court Jurisdiction

Jurisdiction in the United States District Court for the Southern District of Alabama was based on Section 3231 of Title 18, U.S.C.

Facts

In United States v. Meacham, 626 F.2d 503, the Fifth Circuit agreed with Defendant Ward's contention that he should have been granted severance at his initial trial. Following the indictment of Ward and his Co-Defendants, the government moved to adopt a multiple jury procedure which would effectuate a severance while conserving judicial

time and resources. Pursuant to this technique, two juries would be impanelled; one sitting in judgment on Ward, while the other would try the remaining four Co-Defendants. The judge granted the motion, careful to point out that Ward's complete severance would be insured by instructing each jury to consider only that evidence relative to the particular Defendant(s) whom they would be trying and by momentarily excusing one jury in the event evidence was to be introduced against the Defendant(s) being tried by the other jury. Although several days after the motion was granted, Meacham, Metzger, and Gilroy all pled guilty, leaving Ward and Hayes as the only Defendants, the court went ahead with the multiple jury procedure.

Both Petitioner Hayes and Defendant Ward proceeded to trial, represented by separate counsel. Both juries sat in the same courtroom and listened to evidence presented jointly against Petitioner Hayes and Defendant Ward and each jury was excused when it

was deemed that certain evidence could not be admitted against the excused jury's Defendant. The trial concluded with the government giving separate summation before both juries, each of which returned with a verdict of guilty against its separate Defendant.

REASONS WHY THE WRIT SHOULD BE GRANTED

The United States Court of Appeals for the Eleventh Circuit has sanctioned such a departure from the accepted and usual course of judicial proceeding (use of multiple juries) as to call for an exercise of this Court's power of supervision pursuant to Supreme Court Rules, Part V, Rule 17(1)(a).

ARGUMENT

The "multiple jury" (United States v. Sidman, 470 F.2d 1158, at 1160, Fn. 1, 9th Cir. 1972) procedure ("the procedure") followed in this case prejudiced Hayes' rights under the Fifth and Sixth Amendment to the United States Constititon. These deprivations flowed from both the inherent prejudices caused by this procedure and by actual prejudice during the course of the trial derivative of this procedure.

The reason given by the lower court in adopting the multiple jury procedure was that such procedure would be in the interest of judicial economy. (See Court's Order, Volume I, Page 35).

The record reflects that the interests of judicial economy were served "de minimus non curat lex", i.e., not commensurately with the degree of prejudice caused Hayes by virtue of the inherent deficiencies in this procedure.

PROCEDURE

Inherent Prejudice: Impermissible Jury Inferences

The multiple jury procedure lends itself to juries inferring that the respective defendants should be treated differently or that one defendant may be "more guilty" than the other. It stimulates juries to attach incriminatory weight to the excluded evidence as to a given defendant.

Inherent Prejudice: Confusion of Proper Fact Finding

This procedure creates a substantial danger of confusion of the fact-finding process during the course of the trial. Normal courtroom procedure regarding objections to evidence would be disrupted should any objection be overruled as to one defendant but sustained as to the other. The former's jury would be permitted to consider the evidence while the latter would be instructed to disregard the evidence. Anything other than the most simple of cases could result in fact-finding chaos.

Inherent Prejudice:
Prophesying Evidence

This procedure places the unnecessary and therefore unreasonable burden upon both prosecuting and defense attorneys to anticipate when impending evidence is relevant to one case but prejudicial to the other.

Actual Prejudice:
Improper Impeachment

Hayes called but one defense witness, the Co-Defendant Ward, to testify in his behalf. The multiple jury procedure in this case caused the improper (although assumedly inadvertent) impeachment of Hayes' witness Ward by virtue of Ward being an accused party. This prejudicial impeachment of Hayes' only defense witness manifested itself by way of government cross-examination and during the government's summation. This improper impeachment constitutes a deprivation and/or abrogation and/or dilution of Hayes' rights to call witnesses under the Sixth Amendment to the United States Constitution and Hayes' rights to fundamental fairness as

embodied by the due process clause of the Fifth Amendment to the United States Constitution.

Actual Prejudice:
Prejudicial Government Summation

The procedure caused improper summation by government counsel. Actual prejudice occurred when government counsel inadvertently, by implication, rebutted one of the two crucial contentions made by Hayes underlying his theory of defense by referring to evidence from the "other" case.

EFFECT OF PREJUDICE

Justice, not judicial economy, is the first principle of our system of criminal jurisprudence. Under no circumstances should well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial. United States v. Crane, 499 F.2d 1385, 1388 (6th Cir. 1974).

The accumulative effect of the actual prejudices and the inherent prejudices caused by the multiple jury procedure followed in this case constitutes a deprivation of: Hayes' rights to fundamental fairness as embodied in the due process clause of the Fifth Amendment to the United States Constitution; his rights to call witnesses in his defense in contemplation of the Sixth Amendment to the United States Constitution.

SUPERVISORY AUTHORITY

The inherent and potential deficiencies of this procedure manifest such possibilities of prejudice to any given defendant

that this Court ought to exercise its supervisory authority and power and establish a prophylactic/per se procedure.

The nonpariel issues raised by this multiple jury procedure truly lend themselves to this Court's consideration and the exercise of its supervisory authority and power. In this regard:

> "We are required to exercise supervisory authority over the administration of justice in courts of this circuit, even in cases where departures from ideal procedures fall short of a violation of due process. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed 819 (1943), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957)." U.S. v. Florea, 541 F.2d 568, 572 (6th Cir. 1976).

This Court should establish a prophylactic/per se rule barring multiple jury usage.

> "Per se rules frequently are fashioned when there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish; or when an important social policy will be served by a prophylactic rule; or a more definite standard is required to guide offical conduct in future cases; or when case by case analysis places an unjustifiable burden on limited judicial resources." Dawson v. Cowan, 531 F.2d 1374, at 1376 (6th Cir. 1976).